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No. 93-987

In the Supreme Court of the United States

OCTOBER TERM, 1993

EDWARD C. MCREADY, PETITIONER

v.

ARTHUR LEVITT, CHAIRMAN,
SECURITIES AND EXCHANGE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1201 *et seq.*, which contains a comprehensive scheme for judicial and administrative review of federal personnel actions, precludes judicial review under the Administrative Procedure Act of personnel actions for which there is no right of review under the CSRA.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is unpublished, but the decision is noted at 998 F.2d 7 (Table). The opinion of the district court (Pet. App. A4-A21) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1993. A petition for rehearing was denied on

[1] Mr. Levitt was sworn in as Chairman of the Securities and Exchange Commission on July 27, 1993, and is automatically substituted for former Chairman Breeden as a respondent in this action. See Fed. R. App. P. 43(c)(1); Sup. Ct. R. 35.3.

September 20, 1993. Pet. App. A3. The petition for a writ of certiorari was filed on December 20, 1993 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was employed by the Federal Trade Commission until January, 1989, when he was terminated as part of a reduction in force. Petitioner registered with the Office of Personnel Management (OPM) for the Displaced Employee Program (DEP). Under that program an agency may not select an individual to fill a vacancy "from an OPM or agency competitive register as long as a qualified DEP registrant is available." 5 C.F.R. 330.305(a). In June, 1989, OPM referred petitioner to the Securities and Exchange Commission (SEC) as a DEP-eligible candidate for a competitive service staff accountant position advertised by the SEC. The SEC interviewed petitioner for the position, but did not select him. OPM approved the SEC's selection of a non-DEP applicant. Pet. App. A6-A10.

Petitioner filed this action against the SEC and OPM, alleging that they had violated various provisions of the Civil Service Reform Act of 1978 (CSRA) by hiring a non-DEP applicant where petitioner was available and qualified for the position.[2] Petitioner contended that the court had jurisdiction to review his claims pursuant to an implied private right of action under the CSRA, or as a review of agency action under the Administrative Procedure Act (APA). Pet. App. A4-A5, A13. Petitioner also

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[2] Petitioner also claimed that the SEC had discriminated against him on the basis of his age, in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.* The district court dismissed that claim (Pet. App. A12) and petitioner does not renew it in this Court.

contacted the Office of Special Counsel (OSC) and requested that it investigate whether the SEC and OPM had engaged in "prohibited personnel practices" within the meaning of 5 U.S.C. 2302 (1988 & Supp. IV 1992) when they failed to hire petitioner and approved the selection of a non-DEP candidate.[3] Some months later petitioner filed an amended complaint, adding OSC as a defendant and alleging that it had unreasonably delayed its investigation of his allegations.

The district court dismissed petitioner's amended complaint for lack of subject matter jurisdiction. The court agreed with respondents that, by enacting the CSRA, Congress had legislated comprehensively in the area of federal personnel practices and provided specified rights of review, which do not include review by the district court of the SEC's decision not to hire petitioner, or review of OSC's alleged failure to respond promptly to his allegations of prohibited personnel practices.[4] Pet.

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[3] 5 U.S.C. 2302(b) (1988 & Supp. IV 1992) lists 11 prohibited personnel practices, ranging from taking any personnel action for a discriminatory reason (5 U.S.C. 2302(b)(1)) to violating a law, rule or regulation that implements merit system principles (5 U.S.C. 2302(b)(11)). The CSRA provides for review of allegations of prohibited personnel actions through referral to OSC for investigation. 5 U.S.C. 1212(a)(2) (Supp. IV 1992). At the close of its investigation OSC may either terminate the investigation or report its findings to the Merit Systems Protection Board (MSPB), the agency involved, and OPM. 5 U.S.C. 1214(a)(2)(A) (Supp. IV 1992) and (b)(2)(A) (Supp. IV 1992). If OSC reports its findings and the agency involved takes no corrective action, OSC may, in its discretion, petition the MSPB for appropriate relief. 5 U.S.C. 1214(b)(2)(A) (Supp. IV 1992). Any final order of the MSPB is subject to review in the Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c) (Supp. IV 1992); 5 U.S.C. 7703(b).

[4] After the district court had dismissed petitioner's claim, OSC advised petitioner that it was terminating its investigation of his al-

App. A15-A21. The court of appeals affirmed in a brief per curiam opinion, "substantially for the reasons stated by the district court." *Id.* at A1-A2.

ARGUMENT

1. Petitioner contends (Pet. 9) that the SEC's failure to hire him and OPM's approval of that decision constituted "prohibited personnel practices" in violation of the CSRA. Review of such allegations under the CSRA is limited to investigation by OSC, which is to report back to the agency involved if it "determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred * * * which requires corrective action," 5 U.S.C. 1214(b)(2)(A) (Supp. IV 1992), and which "may" petition the MSPB for further review if the employing agency then fails to take corrective action, 5 U.S.C. 1214(b)(2)(B) (Supp. IV 1992). See 5 U.S.C. 2302 (1988 & Supp. IV 1992), 1212 (Supp. IV 1992), 1214 (Supp. IV 1992); see also note 3, *supra*. The CSRA does not provide for district court review of alleged prohibited personnel practices, and provides for review by the Court of Appeals for the Federal Circuit only in cases that have been referred to and passed on by the MSPB. 5 U.S.C. 1214(c) (Supp. IV 1992).

In addition to "prohibited personnel practices" of the sort alleged by petitioner, the CSRA defines two other categories of personnel practices, each subject to a different regime of administrative and judicial review according to the seriousness of the action. Particularly serious adverse actions, including terminations, reduc-

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legations because it had determined that the evidence would not support a finding that any prohibited personnel practice had occurred. See 5 U.S.C. 1214(a)(2)(A) (Supp. IV 1992). The CSRA does not provide for judicial review of OSC's decision to terminate an investigation.

tions in pay or grade, and suspensions of more than 14 days, entitle the affected employee to review by the MSPB and by the Federal Circuit. 5 U.S.C. 7512, 7513(d), 7701 (1988 & Supp. IV 1992), 7703 (1988 & Supp. IV 1992). The least serious adverse actions, such as a suspension of not more than 14 days that does not otherwise constitute a "prohibited personnel practice," are subject only to internal agency grievance procedures. 5 U.S.C. 7501-7503 (1988 & Supp. IV 1992). "Prohibited personnel practices," as explained above, define a middle category of adverse actions which, under the statute, entitle the employee to an independent investigation by OSC, but condition further administrative or judicial review on the results of that investigation and on OSC's decision to petition the MSPB for corrective action. The courts below correctly held that Congress intended these carefully articulated statutory provisions to provide the exclusive means of administrative and judicial review for allegations of CSRA violations by federal employees and job applicants like petitioner. See Pet. App. A14-A16.

In *United States* v. *Fausto*, 484 U.S. 439 (1988), this Court declined to find an implied right of action under the Back Pay Act in favor of a federal employee for whom no right of review was available under the CSRA. *Fausto* recognized that in enacting the CSRA Congress intended to replace a confusing patchwork of procedural rules relating to different civil service protections with "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445. The Court explained that in fashioning that integrated scheme, Congress deliberately limited the rights of certain groups of employees to review of certain types of actions. *Id.* at 446-449. Since the appellant in *Fausto* was

not within the group entitled to judicial review of the violations he alleged under the CSRA, the Court refused to permit review under the Back Pay Act. *Id.* at 455. The Court has thus made clear that because Congress has legislated comprehensively in the area of federal employment practices, and provided specific judicial and administrative review procedures for violations of protected rights, it is inappropriate for courts to recognize remedies other than those provided in the statutory scheme. See also *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Brown* v. *GSA*, 425 U.S. 820 (1976).

Petitioner contends (Pet. 19-25) that in *Fausto* the Court discerned only a congressional intention to limit the rights of employees in the "excepted" federal service, not those (like petitioner) in the "competitive" service. To the contrary, while *Fausto* itself dealt only with an "excepted service" employee and with an alleged remedy under the Back Pay Act, the clear import of the decision is much broader. Like the employee in *Fausto*, petitioner seeks judicial review of a personnel action for which the CSRA does not provide review. As in *Fausto*, such a right should not be recognized by the courts in derogation of the "integrated scheme of administrative and judicial review" (484 U.S. at 445) carefully designed by Congress and embodied in the CSRA.[5]

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[5] The district court also held that it lacked jurisdiction to consider petitioner's allegation that OSC had not acted to investigate his complaint against the SEC and OPM. Pet. App. A18-A21. Assuming that some form of judicial relief would be available to compel OSC to comply with its statutory duty to investigate an employee's complaint if it had wholly failed to do so (see, *e.g.*, *Barnhart* v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985) (dictum)), the district court correctly held that such relief could only be sought from the Court of Appeals for the Federal Circuit, which would have exclusive jurisdiction to conduct any eventual judicial review

2. The decision below is consistent with decisions of other courts of appeals. See, *e.g.*, *Stephens* v. *Department of Health & Human Services*, 901 F.2d 1571, 1575-1576 (11th Cir. 1990), cert. denied, 498 U.S. 998 (1990); *Harrison* v. *Bowen*, 815 F.2d 1505, 1510-1516 (D.C. Cir. 1987); *Pinar* v. *Dole*, 747 F.2d 899 (4th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); *Carducci* v. *Regan*, 714 F.2d 171, 173-175 (D.C. Cir. 1983). Th decisions in *Dugan* v. *Ramsay*, 727 F.2d 192, 195 (1st Cir. 1984), and *Gilley* v. *United States*, 649 F.2d 449 (6th Cir. 1981), cited by petitioner (Pet. 30-31), predated *Fausto*, and in subsequent decisions the same courts have adopted the *Fausto* analysis. *Diaz* v. *United States Postal Service*, 853 F.2d 5, 7-9 (1st Cir. 1988); *Ryon* v. *O'Neill*, 894 F.2d 199 (6th Cir. 1990); see also *Berrios* v. *Department of Army*, 884 F.2d 28, 30-33 (1st Cir. 1989) ("There is no longer any serious dispute that the CSRA preempts challenges to personnel actions brought under federal law."); *Roth* v. *United States*, 952 F.2d 611, 614-615 (1st Cir. 1991) (state law claims).[6] There is therefore no conflict among the courts of appeals that requires resolution by this Court.

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of an MSPB order resulting from an OSC investigation. Pet. App. A18-A21; see also *Telecommunications Research & Action Center* v. *FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984). In any event, any claim based on inaction by the OSC is now moot: as petitioner concedes (Pet. 12), OSC has now completed its investigation and concluded that no prohibited personnel action occurred. As to any complaint about the *result* of OSC's investigation, the judgment below remains correct for the reason discussed above: the comprehensive scheme detailed in the CSRA does not provide for judicial review of the conduct or outcome of OSC investigations.

[6] Petitioner's reliance (Pet. 18-19) on *Etelson* v. *OPM*, 684 F.2d 918 (D.C. Cir. 1982), is similarly misplaced. *Etelson* predated the CSRA, and in any event it was decided by the same court that rendered the decision below. An intra-circuit conflict would not be an appropriate ground for review by this Court, even if such a

3. Finally, petitioner contends (Pet. 25-31) that 5 U.S.C. 1222 (Supp. IV 1992), added to the CSRA by the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, § 3(a)(13), 103 Stat. 30, reinstated APA review of personnel actions covered by the CSRA. Petitioner relies on the fact that Section 1222 provides generally that nothing in Chapter 12 or Chapter 23 of Title 5 (5 U.S.C. 1201-1222 (1988 & Supp. IV 1992), 2301-2305 (1988 & Supp. IV 1992)) "shall be construed to limit any right or remedy available under a provision of a statute which is outside of both [chapter 12] and chapter 23." As the court below concluded (Pet. App. A16-A17), however, Section 1222 was not intended to reinstate APA review of routine employee complaints about agency personnel decisions.

The legislative history of Section 1222 states that:

> The bill contains a new section 1222 * * * which provides that the network of rights and remedies created under chapter 12 and chapter 23 of title 5 is not meant to limit any right or remedy which might be available under any other statute. Other statutes which might provide relief for whistleblowers include the Privacy Act, a large number of environmental and labor statutes which provide specific protections to employees who cooperate with federal agencies, and civil rights statutes under title 42, United States Code. Section 1222 is not intended to create a cause of action where none otherwise exists or to reverse any court decision. Rather, section 1222 says it is not the intent of Congress that the procedures under chapters 12 and 23 of title 5, United States Code, are meant to provide exclusive remedies.

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conflict existed. See, *e.g.*, *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

135 Cong. Rec. 4514 (1989); *id.* at 4510 (explaining sources and authority of legislative history); *Rivera* v. *United States*, 924 F.2d 948, 953 & n.6 (9th Cir. 1991). That explanation makes clear that Section 1222 was intended to preserve any separate statutory protections "*for whistleblowers*" that might otherwise have been preempted by the detailed whistleblower provisions of Chapters 12 and 23, as amended by the WPA. See, *e.g.*, 5 U.S.C. 1221 (Supp. IV 1992) (added by the WPA, creating an individual right of direct appeal to the MSPB in whistleblower cases that is not available in cases involving other "prohibited personnel practices"). There is no indication that Section 1222 was intended to contradict the conclusion, embodied in this Court's decision in *Fausto* and in a number of court of appeals cases predating the WPA (see p. 7, *supra*), that the comprehensive administrative and judicial review provisions of the CSRA indicate a congressional intention to direct all non-whistleblower challenges to agency personnel decisions through the channels specified in the CSRA. Indeed, as the court below recognized (Pet. App. A17), petitioner's reading of Section 1222 would effectively reverse *Fausto* and the other decisions discussed above, a result that the Congress that enacted the WPA explicitly disclaimed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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